

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CHRISTINA HOOD)
)
Plaintiff/Appellant,)
)
v.)
)
PRIME TIME RENTALS, INC.,)
)
Defendant/Appellee.)

FILED
Appeal No. **March 31, 1999**
01A01-9807-CH-352
Cecil Crowson, Jr.
Appellate Court Clerk
Davidson Chancery
No. 98-1611-I

APPEAL FROM THE CHANCERY COURT FOR DAVIDSON
COUNTY AT NASHVILLE, TENNESSEE

THE HONORABLE CLAUDIA BONNYMAN,
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REVERSED AND REMANDED

PATRICIA J. COTTRELL,
JUDGE

CONCUR:

CANTRELL, J.
KOCH, J.

OPINION

The Plaintiff, Christina Hood, appeals the dismissal of her complaint and the imposition of court costs in state court, following the removal of her suit to federal court by the Defendant. In this appeal Plaintiff asserts that, under 28 U.S.C. §1446(d), once a case is removed to federal court, state court has no authority to dismiss a case or assess costs, unless and until the case is remanded. We agree.

Plaintiff filed a complaint in Davidson County Chancery Court against her former employer, Prime Time Rentals Inc. On June 26, 1998, Defendant filed a Notice of Removal and removed this action to the United States District Court for the Middle District of Tennessee. On June 29, 1998, the state trial court entered an order dismissing this action and assessing costs against the Plaintiff. Plaintiff now appeals claiming that the state court lacks authority to enter such an order. In the alternative Plaintiff claims that her constitutional rights to due process and equal protection have been violated.¹

Plaintiff's contention that the state court may not dismiss her claim and assess costs once removal has been effected is based on 28 U.S.C. §1446(d) which provides:

Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and **the State court shall proceed no further unless and until the case is remanded.**

Id. (emphasis added)

Federal courts have consistently held that the removal of an action to federal court divests the state court of jurisdiction to take further action. Pursuant to § 1446, "it has been uniformly held that the state court loses all jurisdiction to proceed immediately upon the filing of the petition in the federal

¹ Appellee, Defendant below, has filed with this Court a "Notice of No Opposition to Appeal" in which Appellee states it has no opposition to the relief sought by Appellant.

court and a copy in the state court." *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1239 (9th Cir. 1994); *Moore v. Interstate Fire Insurance*, 717 F.Supp.1193 (S.D. Miss 1989); *South Carolina v. Moore*, 447 F.2d 1067, 1073 (4th Cir. 1971). "Any further proceeding in the state court in the removed action, unless and until the case is remanded, would be a nullity." *1A Moore's Federal Practice* § 0.168[3-8-4]. See also, *Caldwell v. Montgomery Ward and Co.*, 207 F.Supp. 161 (S.D. Texas 1962).

The courts of other states have also interpreted Section 1446(d) to divest a state court of jurisdiction to proceed further upon the filing of a petition for removal. *Pacific Spruce Corporation v. City of Yachats*, 952 P.2d 575 (Or. App. 1998); *Preston v. Allstate Insurance Company*, 627 So.2d 1322 (Fla. Dist. Ct. App. 1993); *Sugimoto v. Exportadora De Sal*, 284 Cal Rptr. 275 (Cal. Ct. App. 1991); *Meyerland Co. v. Federal Deposit Insurance Co.*, 848 S.W.2d 82 (Texas 1993).

In a well reasoned, but unreported, opinion, this Court addressed a similar issue in *Bolivar Sand Co. v. Allied Equipment Inc.*, 1987 WL 9375 (Tenn. App. April 13, 1987). In *Bolivar* the Defendant removed the case to federal court following the trial court's denial of the Defendant's motion for directed verdict. After the filing of the removal petition, the trial court continued to hear the case in state court. The federal court eventually denied the Defendant's petition for removal and remanded the case back to state court. Thus, the question presented in *Bolivar Sand Co.* was whether the intervening actions by the state court were valid. This Court first determined that it was error for the trial court to proceed with adjudicating the case after removal was effected, holding:

The express language of § 1446(e) [sic] and its case law progeny reveal that once the removal is effected the state court will automatically be divested of jurisdiction and the federal court will then have the sole jurisdiction for determining the merits of the removal. The state court cannot proceed further "unless and until the case is remanded."

Id. at *5

This Court then examined the effect of the federal court's later remand to state court. This Court determined that while earlier law allowed the state

court to retain jurisdiction should the federal court remand for want of jurisdiction, § 1446 clearly provides that removal is effected upon completion of the procedural steps specified therein, irrespective of the ultimate determination on removability. Relying on a thorough examination of cases from other states and from federal courts, this Court held that the federal court's decision to remand did not validate the state trial court proceedings which took place between removal to and remand from the federal court. Most importantly for the instant appeal, this court held that the state court was without jurisdiction to proceed further once the action was removed.

Based upon *Bolivar Sand Co.*, and our review of cases from other jurisdictions, we are of the opinion there can be no question that a state court can proceed no further when a case is removed to federal court, unless and until the case is remanded. The only remaining question is whether by dismissing the action and taxing costs, a state court has "proceeded" further.

Other state courts have adopted the position that a dismissal is a proceeding under section 1446(d) and that, therefore, once a case is removed to federal court, a state court has no jurisdiction to dismiss the state court suit, unless and until the case is remanded. *Pacific Spruce Corporation v. City of Yachats*, 952 P.2d 575 (Or. App. 1998); *Preston v. Allstate Insurance Company*, 627 So.2d 1322 (Fla. Dist. Ct. App. 1993); *Sugimoto v. Exportadora De Sal*, 284 Cal Rptr. 275 (Cal. Ct. App. 1991). The court in *Sugimoto* stated:

Thus clearly a dismissal with or without prejudice is a proceeding under section 1446(d). As such the dismissals here are not in accord with federal law and the trial court had no jurisdiction to make such orders.

Sugimoto v. Exportadora de Sal, 284 Cal. Rptr. at 277.

Based on the foregoing authority, we find that the state trial court erred

in dismissing the Plaintiff's action and assessing costs after the removal had been effected on June 26, 1998. The express statutory language of § 1446(d) and case law from multiple jurisdictions interpreting it compel the conclusion that once the removal is effected, the state court will automatically be divested of authority to proceed further and the federal court will then have the sole authority to take action. The state court cannot proceed further "unless and until the case is remanded." 28 U.S.C. §1446(d). The state court has no authority to dismiss a removed action and tax costs pending disposition of the removal or disposition of the lawsuit by the federal court.

While courts interpreting § 1446(d) have described the effect of removal as a divesting of jurisdiction from the state court, the language of § 1446(d) does not include any reference to jurisdiction. It does, however, contain a clear and direct prohibition against further proceedings by the state court. Thus, the effect of removal can be characterized as an automatic, statutorily-created stay on proceedings in state court. This characterization is helpful in anticipating and avoiding issues which might otherwise arise if the federal court remands a case after determining removal was improper. As the court in *Sugimoto* observed:

A "dismissal" and a "stay" are not the same. When a court orders a "stay", the action, although dormant, remains pending in that court. Following a "dismissal" the action is no longer pending. And even though the dismissed action can be refiled it must overcome additional procedural obstacles, including but not limited to, applicable statutes of limitations.

284 Cal. Rptr. at 277.

The taxing of costs by the state trial court would be appropriate when the case is resolved. Such resolution could occur by determination on the merits by the state court if the federal court remands the case denying removal. Or, the

federal court could dispose of the case on the merits. In either situation, the state trial court could then tax costs in the normal fashion.

Because we have reached our decision based on other grounds, we do not find it necessary to address the constitutional issues raised by the Appellant.

The trial court's order dismissing this action and taxing costs to the Plaintiff is hereby vacated, and the cause is remanded to the trial court for such further proceedings, if any, as may be necessary and proper.

As a general rule, it is at this point in our opinion that we tax costs. We are not unaware of the paradox which could be perceived in this Court taxing costs where we have ruled that the trial court was without authority to tax costs. However, this Court has jurisdiction to determine whether the trial court had authority to dismiss this action and tax costs to the Plaintiff and has exercised that jurisdiction at the request of Appellant. Although Appellant should be considered the prevailing party in this appeal, Appellee did not oppose the relief sought by Appellant and granted herein. Further, it would appear that the dismissal of Plaintiff's case and the attendant taxing of costs was done by the trial court on its own initiative without any request by Appellee. This Court is vested with wide discretion in the taxing of costs. Tenn. R. App. P. 40. We have carefully considered the unique posture of this case, as well as the equities involved. Based upon that consideration, we are of the opinion that the costs of appeal should be taxed equally to Appellant and Appellee. However, the costs of the trial court clerk normally included as costs on appeal shall not be taxed to either party.

PATRICIA J. COTTRELL, JUDGE

CONCUR:

BEN H. CANTRELL, PRESIDING JUDGE (M.S.)

WILLIAM C. KOCH, JUDGE